SUPREME COURT U. S.

JUN 10 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. [redacted]222

October Term, 1969

JACK G. BUNCHER, d/b/a
THE BUNCHER COMPANY,

Petitioner,

v.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	3
Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
1. The Court of Appeals decided a federal question in a way in conflict with the applicable decisions of the Supreme Court	8
2. The Court of Appeals has decided an important question of federal law which has not been, but which should be settled by the Supreme Court	11
Conclusion	13
Appendix A: Judgment on Rehearing	1b
Appendix B: Opinion on Rehearing	3b
Appendix C: Judgment, August 1, 1968, Denying Enforcement of Board's Order	20b
Appendix D: Opinion of Court of Appeals, June 27, 1968, Denying Enforcement of Board's Order	22b
Appendix E: Supplemental Decision and Order of the National Labor Relations Board, 164 NLRB No. 31	36b
Appendix F: Trial Examiner's Second Supplemental Decision, May 23, 1966	46b
Appendix G: Order of the National Labor Relations Board Remanding Proceeding to Trial Examiner, January 13, 1966	73b
Appendix H: Trial Examiner's Supplemental Decision, August 6, 1965	75b
Appendix I: Decision and Order of the National Labor Relations Board and Trial Examiner's Intermediate Report, June 30, 1961, 131 NLRB 1444	97b
Appendix J: Statutes	148b

II.

Citations.

PAGE

Cases:

The Buncher Company, 131 NLRB 1444 (1961) 3, 11
Consolidated Edison Co. v. Labor Board, 305 U. S. 197 (1938) 9
Labor Board v. Seven-Up Co., 344 U. S. 344 (1953) 9
Republic Steel Corp. v. Labor Board, 311 U. S. 7 (1940) 9, 10
Universal Camera Corp. v. Labor Board, 340 U. S. 474 (1951) 8, 10

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.*) 3

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Jack G. Buncher, an individual doing business as The Buncher Company, Petitioner, respectfully petitions for a writ of certiorari to review Judgment on Rehearing of the United States Court of Appeals for the Third Circuit entered on March 13, 1969, by which the Court directed enforcement of an order of the National Labor Relations Board.

Opinions Below

The Judgment on Rehearing of the Court of Appeals, filed March 13, 1969, enforcing the Board's order, is printed in Appendix A, *infra*, pp. 1b-2b.

The Opinion on Rehearing, enforcing the Board's order, filed January 20, 1969, is reported at 405 F. 2d 787 and is printed in Appendix B, *infra*, pp. 3b-19b.

The Judgment of the Court of Appeals filed August 1, 1968, denying enforcement of the Board's order is printed in Appendix C, *infra*, pp. 20b-21b.

The Opinion of the Court of Appeals, denying enforcement of the Board's order, filed June 27, 1968, not officially reported, is printed in Appendix D, *infra*, pp. 22b-35b.

The Supplemental Decision and Order of the National Labor Relations Board, filed May 4, 1967, is reported at 164 NLRB No. 31 and is printed in Appendix E, *infra*, pp. 36b-45b.

The Trial Examiner's Second Supplemental Decision, filed May 23, 1966, is printed in Appendix F, *infra*, pp. 46b-72b.

Order of the National Labor Relations Board Remanding Proceeding to Trial Examiner, dated January 13, 1966, is printed in Appendix G, *infra*, pp. 73b-74b.

Trial Examiner's Supplemental Decision, filed August 6, 1965, is printed in Appendix H, *infra*, pp. 75b-96b.

Decision and Order of the National Labor Relations Board and Trial Examiner's Intermediate Report, in the original unfair labor practice proceeding, dated June 30, 1961, and reported at 131 NLRB 1444, is printed in Appendix I, *infra*, pp. 97b-147b.

Jurisdiction

The decree of the Court of Appeals was entered on March 13, 1969 (App. A, *infra*, p. 1b). Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented for Review

1. Where the National Labor Relations Board finds that an employer has no system of seniority and directs that in computing back pay under its order the non-discriminatory practices of the employer theretofore used in his business be used to determine which employees would be laid off or retained, is it arbitrary and unreasonable for the Board to devise and use in the back pay proceeding a system of pseudo seniority without any support whatsoever in the record and to reject all testimony in the record concerning the employer's non-discriminatory practices?

2. In a back pay proceeding before the National Labor Relations Board does the General Counsel for the Board have the burden of proving on a rational basis the amount of back pay due each claimant before the respondent is required to disprove General Counsel's contentions?

Statutory Provisions Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 *et seq.*) are set forth in Appendix J, *infra*, pp. 148b-150b.

Statement of the Case

In 1961 the National Labor Relations Board found that Jack Buncher had committed an unfair labor practice in January and February, 1960, by laying off thirteen employees because of their union activity. *The Buncher Company*, 131 NLRB 1444. In its decision, the Board adopted the findings of its Trial Examiner, which recognized the unique nature of Buncher's business and the economic justification for a reduction in force shortly

following those months, and stated that inasmuch as some of the employees discriminated against might have been laid off in a subsequent reduction in force absent unfair labor practices, this possibility should be considered in computing back pay (App., p. 98b).

The guidelines stated by the Board were to be "such system of seniority or other non-discriminatory practice heretofore applied by the Respondent in the conduct of his business." (*Id.*)

The Board's order was enforced by the Court of Appeals for the Third Circuit, 316 F. 2d 928 (1963).

Thereafter in 1964 the Board instituted back pay proceedings, presumably in accordance with its prior order.

However, although the original Trial Examiner had found that Buncher had and used no system of seniority, the Regional Director for the Board prepared back pay computations based solely and entirely upon what purported to be a system of seniority. In point of fact this "system" was purely arbitrary, and did not credit all employees with all service, but assumed that anyone absent for seven days lost all his prior service, but anyone absent for less did not. Furthermore, the Board applied this seven day "rule" only to part of the period (Joint App. 186a-188a—Court of Appeals). It was contrived to punish, not as a genuine attempt to carry out the Board's ground rules as set forth in its prior decision, and upon which Buncher was entitled to rely. Neither Buncher nor anyone else to our knowledge ever used such a "system." The system also ignored the skills, or lack of skills, of the employees, and assumed that all those listed could do every job Buncher had with only two exceptions—a carpenter and a plumber.

As both the original Trial Examiner and the second Trial Examiner found, Buncher's business was unique (App. pp. 49b-51b, 106b).

He conducted a widely diversified business, including scrap reclamation, scrap breaking, construction and leasing of industrial buildings, demolition and salvage of buildings and bridge, steel fabrication, and operation and maintenance of a large river port, including a half-mile long dock and vessels. In order to carry on this business, he needed men who could perform the widely diversified jobs at the various locations (App. pp. 49b-51b). He had to have men who could fill the jobs that had to be filled at the time the work had to be done. Buncher couldn't have used straight seniority in selecting men to retain or recall if he had wanted to, nor could any sensible or valid appraisal of the situation in 1960 and 1961 be made using straight seniority.

Prior to the back pay hearing, the Trial Examiner ordered Buncher on pain of striking of his answer to the specifications to produce in writing in detail all the criteria used by him in selecting employees for retention and layoff, applying such criteria not only to the thirteen discriminatees, but to every employee retained at that time or subsequently employed (Joint App. 117a-118a—Court of Appeals).

Buncher did so in a document entitled "Respondent's Answer To Order To Show Cause."[1] (Joint App. 119a-133a—Court of Appeals).

[1] This response to an order to show cause contains the chart which both the Board and the Court criticize as "prepared after the fact" or "contrived," and which characterization is said to justify rejection of all 700 pages of testimony by witnesses. It was simply a pleading that had to be filed. It could hardly have been prepared before the specification to which it was an answer, and the fact that an answer denies liability and, as required by the rules, tells why liability is denied is no justification for rejecting all sworn testimony, even though some small part of the testimony differs from the pleading.

In the hearing which followed, General Counsel introduced no testimony or evidence whatsoever other than an explanation of the origin of the Regional Director's so-called "seniority" system.

Respondent, on the other hand, produced four witnesses who testified at length and specifically as to every operation of Buncher, every machine, every job, and every person employed, and as to every non-discriminatory factor listed. This testimony covered 700 pages of transcript in addition to documentary exhibits. None of this testimony was contradicted.

On August 6, 1965, the Trial Examiner handed down his Supplemental Decision, awarding the discriminatees approximately $19,000 in back pay, to May 12, 1960, which he held to be the first date of economic reduction in force, but rejecting the back pay specifications thereafter because he found that the Regional Director based his computations solely and entirely upon a fictitious system of seniority, contrary to the Board's previous decision, and that this was arbitrary and unreasonable.

On January 13, 1966, the Board issued an Order Remanding Proceeding to Trial Examiner stating that the fact that respondent did not use seniority did not render General Counsel's use of seniority arbitrary or unreasonable *per se* (App pp. 73b-74b).

On May 23, 1966, the Trial Examiner issued his Second Supplemental Decision (App. pp. 46b-72b) in which he rejected all respondent's testimony and awarded all amounts claimed in the specifications, some $99,000, plus interest.

On May 4, 1967, the Board issued its Supplemental Decision and Order upholding the Trial Examiner's second effort, saying that use of "seniority" was appropriate here

to prevent Buncher from profiting from his wrongdoing, and approving the Trial Examiner's rejection of all respondent's testimony. The Trial Examiner and the Board agreed that when Buncher and his witnesses said something complimentary about the discriminatees, they were truthful, but when they said anything that would justify their lay off, they were liars.

Respondent appealed. The case was heard by a panel of three judges of the Court of Appeals. Two judges held that the Board's use of its so-called seniority on the record in this case was unreasonable and arbitrary, pointing to the facts contained in the record (App. pp. 22b-35b). The third judge dissented, saying the Board's use of so-called "seniority" was not arbitrary or unreasonable in these circumstances (App. pp. 33b-35b).

The Court's judgment was entered on August 1, 1968 (App. pp. 20b-21b).

Thereafter, the Board petitioned for rehearing, and it was granted.

After argument before the Court *en banc*, the Court, by a majority of five to three, recalled its prior judgment denying enforcement of the Board's order and issued a new judgment enforcing it(App. pp. 1b-2b).

The Court majority held that the Board was correct in rejecting all the testimony and in creating and using what the Board called a system of seniority (App. pp. 7b-8b). The Court majority notes that admittedly Buncher had no seniority system (App. p. 8b) and that the "examiner's"[2] seven day rule was "admitedly rough" (App. p. 9b), but concluded that this was all right because if all respondent's

[2] This was not the Examiner's rule, but the Regional Director's.

testimony—indeed, the entire record—were rejected as incredible, respondent had failed to sustain its burden of proof, and the Board could use its "system" because there was no other.

The dissenting opinion, written by Circuit Judge Van Dusen and joined in by two other judges of the Court *en banc* (App. pp. 10b-21b) carefully analyzes the case on the basis of the whole record, and concludes that the Board's "seniority system" is unreasonable and arbitrary in the circumstances of this case; that the Board's order should be denied enforcement, and that the case should be remanded to the Board.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals decided a federal question in a way in conflict with the applicable decisions of the Supreme Court.

The decision in *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, 491 (1951) established the standard to be applied by the Courts of Appeal in reviewing a decision of the National Labor Relations Board. The Court is to determine whether or not the Board's findings are based upon substantial evidence in the record considered as a whole.

The majority of the Court of Appeals in the instant case completely disregarded this standard, and upheld and enforced an order of the Board which has no support whatsoever in the record. Indeed, the Board's order is in contradiction to other and previous findings of two different Trial Examiners, the first of which were upheld by the Board and the Court in prior proceedings in this very case.

In addition, the Court of Appeals approved the Board's refusal to give any weight whatsoever to some 700 pages of uncontradicted testimony which is contrary to the Board's unsupported assumptions.

The Board's reason, implicitly approved by the Court of Appeals, was that if it did not make these unsupported assumptions, or if it gave any weight to the testimony and evidence in the record, Jack Buncher, who the Board had held committed an unfair labor practice, might escape the punishment which the Board felt he deserved.

There is no doubt that the Board has broad authority to fashion remedial orders, but this "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the purposes of the Act might be effectuated by such an order." *Republic Steel Corp. v. Labor Board*, 311 U. S. 7 (1940); *Consolidated Edison Co. v. Labor Board*, 305 U. S. 197, 235, 236 (1938); *Labor Board v. Seven-Up Co.*, 344 U. S. 344, 349 (1953).

Furthermore, the Board's concern that Buncher would otherwise escape any liability unless it adopted a back pay formula without any foundation in fact or law is completely unwarranted.

If the case of each discriminatee were examined on the basis of the evidence, it is entirely possible that some discriminatees might receive back pay for part of the period, or some for all of the period, or some for none of the period.[3]

[3] Surely it is to Buncher's credit that as soon as he received the Board's original order late in 1961, he offered the discriminatees work, and most of them accepted, thus, terminating the back pay claim as of January 12, 1962, for all but three of the thirteen.

However, no fair and reasonable tribunal could find that although Buncher had only one power shovel operating, he would have kept five shovel operators on his payroll. Maybe one of the discriminatees would have worked, but not three (App. pp. 15b-18b), and thus one would receive back pay for the time the shovel worked and two would not.

In addition, the Board's method of determining who would have worked consisted of simply listing all employees according to an arbitrary "seniority" date (bearing no relationship to any seniority system ever used by Buncher, or by anyone else to our knowledge); by then drawing a line under the number of persons employed at any given time; and then conclusively presuming that anyone under the line would have been laid off (App. pp. 70b-71b).

This assumed that if Buncher had—as he did—a gantry crane to operate he would have laid off the gantry crane operator and used a welder to run the crane; or, if he needed a bargeman, he would have used a bulldozer operator; or if he needed a steeplejack, he would have used a laborer who never worked in high construction. There is not a word of testimony in the record to support an assumption so contrary to reason. The record is replete with testimony to the contrary.

The Board's rejection and disregard of all the evidence in this case is so arbitrary, capricious and contrary to reason and to its own instructions in prior proceedings in this very case that it exemplifies the need for reaffirmation of the principles announced in *Universal Camera, Republic Steel*, and the many decisions which have followed and applied these principles.

2. The Court of Appeals has decided an important question of federal law which has not been, but which should be settled by the Supreme Court.

The Board has in recent years been probing its authority to broaden and expand remedial orders.

In most cases this relates to its original orders. In the instant case, it relates to back pay, which is nonetheless a most important feature of the remedial order.

Does the Board, in a back pay case, have the burden of proving on a rational basis the gross amount of back pay due each claimant?

The Court of Appeals majority avoided a direct answer to this question, but it was a major point throughout the proceedings.

The Board had directed in its remedial order, and the Court approved, that in the back pay proceedings a determination of which, if any, discriminatees would have been laid off in the admittedly economic cutbacks in employment should be made in accordance with the system of seniority or other non-discriminatory practice heretofore applied by the respondent in the conduct of his business. *The Buncher Company*, 131 NLRB 1444 at 1445 (App. pp. 98b-99b).

Even the Board and the Court of Appeals concede that Buncher did not use the system of "seniority" adopted by the Board in the back pay proceedings (App. p. 8b). The Board made no effort to investigate any other non-discriminatory practices or factors for making the determination, either before or during the hearing.

The Trial Examiner, in his first Supplemental Decision (App. p. 75b) held that since General Counsel had the burden of proving on a rational basis the gross amount of

back pay due each claimant, and, since the so-called "seniority" method adopted was clearly irrational and contrary to the Board's original findings, respondent was not obliged to come forward to meet a "phantom" (App. p. 87b).

The decision of the Board approved by the Court of Appeals, attempts to place upon the respondent the burden of meeting this phantom—of disproving something never proved.

This question of federal law is critical in this case, and will apply to every back pay case. The Supreme Court should settle this question, and fix the obligation of the Board, acting through its General Counsel, to prove upon a rational basis the amount due each claimant in a back pay case before the respondent is obliged to come forward and rebut such proof.

The diversity of opinions in this case recommends the matter to the Court for review.

Thus, the second Trial Examiner disagreed with the Board; the Board in its second order disagrees with its first order; two judges of a three judge panel disagreed with the third; and five judges of the Court *en banc* disagreed with three judges of the Court.

In the interest not only of Buncher but of future litigants in back pay cases, the Supreme Court should settle this unresolved aspect of Labor Board remedies and procedures.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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